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Appellee's Brief 1975-SC-1181

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**KYSC1975-SC-1181-02**

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# **APPELLEE'S BRIEF**

4606

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# SUPREME COURT OF KENTUCKY

File No. 75-1181

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JAMES A. ROE

LILLIAN ROE, His Wife - - - - Appellants

*versus*

MILBURN CORNETT

ANNA LOUISE CORNETT, His Wife

ROBERT H. HESTER - - - - Appellees

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APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE C. V. SANDERS, TRIAL JUDGE

---

**FILED** **BRIEF FOR APPELLEES**

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MAR 12 1976

J. D. BUCKMAN, JR.

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SUPREME COURT

I certify that a copy of this brief was served upon Honorable Thomas B. Givhan, Givhan and Porter, Shepherdsville, Kentucky, Attorney for Appellants and upon Thomas L. Waller, Taylor and Waller, Shepherdsville, Kentucky, Attorney for Robert H. Hester, Appellee, and upon Honorable C. V. Sanders, Trial Judge, Shepherdsville, Kentucky, 40165, as required by RCA 1.250, this 11<sup>th</sup> day of March, 1976.

*J. D. Buckman Jr.*

*Attorney for Appellees, Milburn Cornett, Anna Louise Cornett*

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### **STATEMENT OF QUESTIONS PRESENTED**

1. Did the Court below err in finding that the Appellants did not have a prescriptive easement over Appellees' land?
2. Did the Court below err in finding that the Appellants failed to prove that the easement over the land of Appellees is a public road?
3. Did the Court err in finding that the Appellees' claim is not barred by laches?
4. Did the Court err in finding that the easement was for the benefit of a particular tract of land, and as such was inalienable?

# SUPREME COURT OF KENTUCKY

File No. 75-1181

---

JAMES A. ROE and  
LILLIAN ROE, His Wife     -     -     -     *Appellants*

*v.*

MILBURN CORNETT and  
ANNA LOUISE CORNETT, His Wife  
ROBERT H. HESTER     -     -     -     -     *Appellees*

---

APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE C. V. SANDERS, TRIAL JUDGE

---

## BRIEF FOR APPELLEES, MILBURN CORNETT AND ANNA LOUISE CORNETT

---

*May it please the Court:*

### STATEMENT OF THE CASE

1. This action was filed in the Bullitt Circuit Court by Plaintiffs-Appellees to enjoin Appellants from using a private road and to further prevent Appellants from making the road a public road in order to sell tracts of land.

2. Plaintiffs-Appellees sought to recover damages.

**Defendants-Appellants Counterclaimed Alleging the  
Following:**

1. That Defendants-Appellants have a prescriptive right to the use of the passway through adverse possession.
2. That they held legal title to the passway.
3. That Plaintiffs-Appellees are estopped to deny the passway.
4. That Plaintiffs-Appellees' claim is barred by laches.
5. That the passway is public road.

**STATEMENT OF FACTS**

A tract of land owned by Wolfe, and which was formerly owned by Wheatley, had by deed the right to the use of a private passway for the purpose of ingress and egress over the land owned by Appellees (T.E., pp. 6-7) (see Exhibit "P-3"). Said Exhibit contained the following language concerning the private passway:

"Exception of a private passageway, 20 feet wide, in favor of what is known as the Wheatley property, which passway is used as a means to ingress and egress to and from said Wheatley property. . . ."

On April 3, 1968, Wolfe executed and delivered to Defendants-Appellants an easement (T.R., p. 7, Exhibit "B") over his land and over the lands of Plaintiffs-Appellees. This conveyance was made to allow

Roe to subdivide his property and to convert the private passway into a public road. (This was not the road used by Roe for ingress and egress to his property.)

### **ARGUMENT**

To support the Court's Findings of Fact, Conclusions of Law and Judgment (TR., pp. 19, 20, 21 and 22), we offer the following in support of our argument:

#### **That Defendants Did Not Have a Prescriptive Right to Use the Passway by Adverse Possession.**

Appellants did not build the road over the land of Wolfe and connect it to the private passway over the lands of Appellees until after the easement was given to him by Wolfe (TR., p. 7, Plaintiffs' Exhibit "B") which was dated April 3, 1968. This does not meet the 15 year requirement in complying with our law.

*Jackey v. Burkhead*, Ky., 318 S. W. 2d 64 (1960).

"To claim an easement by prescription the adverse possession must be actual, open, notorious, forcible, exclusive, and must continue in full force for at least 15 years."

Appellants failed in meeting this requirement, as this road was not constructed until 1968.

But even if we assume that the use after 1968 was adverse, the use of Wolfe must be tacked on to meet the 15 year requirement for prescriptive easements. How can Wolfe's use of the easement possibly be



deemed adverse when Wolfe was entitled to the use? Wolfe acquired by deed the Wheatley property that the easement was originally intended to benefit. The easement appurtenant stayed with the land.

**That Defendants Did Not Have Legal Title to the Passway.**

The Lower Court properly held that the passway never was a public road, or if so, had long since been abandoned. Although the testimony is conflicting on this issue, the greater weight of testimony indicates that the passway was a private drive, and never a public road (T., pp. 24, 99, etc.).

Appellants contend that the passway was once a public county road and remains so today (p. 9). Why then was it necessary for private parties to make improvements on the road? The Bullitt Fiscal Court maintains all county roads in Bullitt County. In *Rose v. Nolen*, 166 Ky. 336, 197 S. W. 229 (1915), the Court of Appeals held that a roadway does not become a "county road" until it has been accepted, improved and maintained by the County. There is no evidence or testimony that a public road was ever established in accordance with statutory procedures. Nor is there any proof of a dedication to public use by plat or deed.

KRS 178.010 (1) defines "County roads" to be "public roads, which have been accepted by the Fiscal Court of the County as a part of the county road system". This statutory requirement had its origin in the Act of 1914 Section 4287, a "county road" can be discontinued only by following the

procedure outlined in KRS 178.050-KRS 178.070. If the road in question had ever been a public road it was long ago abandoned or discontinued by non-use during the prescriptive period.

In *Jones v. Dunn*, 305 Ky. 562, 205 S. W. 2d 156 (1947) the Court recognized the rule to be—

“We believe that the law has been established that an easement acquired by prescription may be extinguished by a non-user under circumstances showing an intention of abandonment whenever such non-user has extended over that period of time sufficient to have created the prescriptive right at it's origin.”

See *Childers v. Burger*, 231 Ky. 508, 21 S. W. 2d 805; *City of Harrodsburg v. Cunningham*, 299 Ky. 193, 184 S. W. 2d 357.

To arrive at it's Findings of Fact that this was not a public road, the Lower Court had the advantage of observing the witnesses and personally viewing the passway in question. In *Jones v. Dunn*, 305 Ky. 562, 205 S. W. 2d 156 (1947) the Court stated:

“We hardly deem it necessary to call attention of Appellants able counsel to our hoary-headed rule of upholding chancellors' Findings of Fact, where such findings are based upon conflicting evidence.”

**Did the Court Err in Finding That Appellees' Claim is Not Barred by Laches?**

The Court in its Findings of Fact (TR. 20 (9)).

“The weight of the evidence does not support the conclusion that the plaintiffs knew of their right to deny the use of the roadway and through negligence and bad faith did not attempt to enforce such right until the defendants had so changed their position in relation to the use of the roadway that defendants could not be restored to their former state. Facts and circumstances entitling the defendants to the benefit of the doctrine of laches are not clearly shown.”

**In Answer to Appellants' Claim That Appellees are Estopped to Deny the Passway.**

The Court in it's Findings of Fact (TR. 20 (8)):

“The improvements made by the defendants to the roadway over plaintiffs' land were not of such extent or nature as will estop plaintiffs from denying the defendants the right to use such roadway.”

Facts constituting estoppel must be established by clear and convincing evidence. This requirement was not met in this case by Appellants.

**Did the Court Err in Finding That the Easement Was for the Benefit of a Particular Tract of Land, and as Such Was Inalienable?**

The Court below properly held that the easement was an easement appurtenant, that it was created with the intention to benefit a particular tract of land (the Wheatley property), and as such could not be conveyed

away so as to benefit other tracts of land. The deed from Sanders to Richardson, in Appellees' chain of title, clearly states the nature of the easement (T.E., pp. 6-7) (see Exhibit "P-3"):

"Exception of a private passageway, 20 feet wide, in favor of what is known as the Wheatley property, which passway is used as a means to ingress and egress to and from said Wheatley property. . . ."

In the case of *Cleve, et al. v. Nairn*, 204 Ky. 342, 264 S. W. 741 (1924) the Court said:

"There is no dissent from the rule that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts to which the right is not attached. The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription or implication. . . ."

In the case of *Howard v. Long*, 238 Ky. 822, 38 S. W. 2d 951 (1931) the Court held that:

"An easement for the benefit of a particular piece of land cannot be enlarged and extended by the owner thereof to other parcels of land adjoining or distinct tracts to which right is not attached, whether originally created by grant, reservation, prescription, or implication."

The above cases have not been overruled.

It is clear that Appellants have no legal title to the passway because Wolfe had no authority to grant an easement to Appellants over the land on Appellees.

### CONCLUSION

We find nothing in the record that would sustain a reversal of the Judgment entered by the Trial Court. On the other hand there has been more than ample evidence and exhibits filed to support the Chancellor's Findings of Fact, Conclusions of Law and Judgment. This case should be affirmed.

Respectfully submitted,

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